Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 77-576

J. GORDON EDWARDS, PH.D., THOMAS H. JUKES, PH.D., ROBERT H. WHITE-STEVENS, PH.D.,

Petitioners,

v.

THE NEW YORK TIMES COMPANY and ROLAND C. CLEMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE NEW YORK TIMES COMPANY IN OPPOSITION

FLOYD ABRAMS
EUGENE R. SCHEIMAN
RUTH D. MACNAUGHTON
CAHILL GORDON & REINDEL
Counsel for Respondent
The New York Times Company
80 Pine Street
New York, New York 10005

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J. Gordon Edwards, Ph.D., Thomas H. Jukes, Ph.D., Robert H. White-Stevens, Ph.D.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE NEW YORK TIMES COMPANY IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (App. A of Petition) is reported at 556 F.2d 113. The opinion of the District Court (App. C of Petition) denying the motion for judgment *n.o.v.* of defendant The New York Times Company (the "*Times*") is reported at 423 F. Supp. 516. The opinion of the District Court (App. B of Petition) denying the motion of defendant Roland C. Clement for judgment *n.o.v.* is unreported. The opinion of the District Court denying motions by the *Times,* Clement and certain other defendants for summary judgment after reargument of a prior order denying summary judgment is reported at 411 F.Supp. 744 and not appended to the Petition.*

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* The Petition (p. 2) inaccurately states that the opinion reported at 411 F.Supp. 744 is reproduced as Appendix D.

Jurisdiction

Petitioners assert jurisdiction of this Court arises under 28 U.S.C. § 1254(1) (1970).

Question Presented

Whether the United States Court of Appeals for the Second Circuit correctly held that a libel judgment against the *Times* for accurately reporting charges made by the National Audubon Society against public figure plaintiffs was impermissible under the First Amendment to the United States Constitution, and, in any event, unsupported by the clear and convincing proof needed to sustain a jury verdict of actual malice.

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

> State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This case arises out of the accurate reporting by the *Times* of accusations made by officials of the National Audubon Society, Inc. ("Audubon") against five scientists, three of whom commenced this action. The accusations were made in the midst of the heated national debate over the use of DDT and its possible effect on bird life in which the plaintiffs and Audubon were—and are—opponents.* In the context of that debate, Audubon accused the plaintiffs of being, in effect, paid liars, an accusation reported by the *Times*, together with denials by those accused.

With a single excepton, the facts of this action as they relate to the *Times* have essentially been undisputed from the outset. In late July or early August, 1972, the Foreword to the April 1972 issue of Audubon's quarterly publication, *American Birds*, came to the attention of John Devlin, Sr., a *Times* reporter who had often written on nature subjects. The Foreword denounced the use being made of Audubon's bird count data by some proponents

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* Audubon actively supported a ban on the use of DDT which was ordered by the Environmental Protection Agency two months before the publication of the *Times* article at issue in this litigation. The plaintiffs vigorously opposed the ban and organizations that advocated it. As the Court of Appeals noted, at times the DDT controversy in which "fundamental questions of value" were at stake, "exceeded the limits of temperance and good manners." (556 F.2d at 116, App. A of Petition, p. 4A) For example, referring to Audubon's opposition to DDT, petitioner Dr. J. Gordon Edwards wrote to the Editor of the *Audubon Magazine* on February 17, 1970 that "I still find it incredible that the Audubon Society leaders persist in their heavily-financed de facto murder plot against the human race. . . ."

of DDT, and accused them of making "false and misleading" statements and of distorting "the facts for the most self-serving of reasons." It concluded as follows:

> "With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders.* Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about." (emphasis in original)

Believing the charges to be newsworthy, Devlin telephoned Robert S. Arbib, Jr. the Audubon editor who had signed the Foreword, and asked Arbib to identify the unnamed persons he referred to in the Foreword as paid liars. (Tr. 65-68, 434-35)* Arbib, after initially declining to provide any names, passed on Devlin's inquiry to Roland C. Clement, Vice President of the Audubon Society and a respondent herein, who gave Arbib a written critique of the pro-DDT views of five scientists he had prepared for publication. (Tr. 438, 501) Arbib then furnished Devlin with five names drawn from Clement's article, including the names of petitioners Dr. J. Gordon Edwards, Dr. Thomas H. Jukes and Dr. Robert H. White-Stevens. (Tr. 441)** What was said at this time later was disputed by Devlin and Arbib, in the one factual controversy that arose in this litigation with respect to the *Times.* Arbib testified that when he gave Devlin the scientists' names, he specifically cautioned the reporter

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* References are to page numbers of the Joint Appendix filed with the Court of Appeals.

** Arbib, in his testimony, disclaimed knowledge when he wrote the Foreword of any particular scientists to whom the Foreword related. (Tr. 444)

that the named individuals were to be referred to as misusers of Audubon data, not as persons who were paid to lie. (Tr. 440) Devlin denied receiving any such warning. (Tr. 133-34)

After his interview with Arbib, Devlin attempted to reach the scientists who had been named by the Audubon editor, and was successful in contacting three of them. He spoke with Dr. White-Stevens and Dr. Jukes, who denied the Audubon charges. (Tr. 164, 291-92) Both followed up their conversations with Devlin by sending him letters enclosing scientific literature on the DDT question. (795e-970e, 689e-741e) Devlin also spoke with Dr. Donald A. Spencer, who called the Audubon charges "almost libelous." (Tr. 75)

On August 14, 1972, the *Times* published, under the headline "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count," an article by Devlin concerning the Audubon Foreword. The article quoted and discussed the Foreword, named the five scientists who had been cited by Arbib in his interview with Devlin and summarized the reactions and denials of the scientists to the Audubon charges.

On the morning of the *Times'* publication, Clement drafted a letter to the *Times,* read it over the telephone to Arbib who was out of town and sent it out over Arbib's signature. (Tr. 462-64, 504) The letter, which was not published by the *Times,* referred to "Jack Devlin's punchy piece" and concluded with the following paragraph:

> "Nor do we like to call people liars, but those who have most consistently misused our data—Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemicals Association, and more recently Nobel laureate Norman E. Borlaug

> —certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy."

Petitioners filed suit against the *Times* and Audubon in April 1973, later joining Arbib and Clement as defendants. As it relates to the *Times*, the complaint alleged that in reporting the charges made by Audubon, the *Times* had published defamatory falsehood about the plaintiffs with malice. Counsel for plaintiffs conceded at trial that no charge of actual malice in the sense of knowing falsity had been made against the *Times* but rather the allegation against the *Times* under the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), "depends squarely upon the second branch, that is, a reckless disregard as to whether the matter was true or not." (Tr. 407)*

Proceedings in the District Court

On January 23, 1976, the District Court, Hon. Charles M. Metzner, U.S.D.J., ruled that Drs. Edwards, White-Stevens and Jukes were public figures in the context of this action,** and denied motions made by the various defendants for summary judgment on the ground that triable issues of fact had been raised in pretrial discovery. (App. D of Petition) When motions for reargument and certification of that decision to the Court of Appeals under 28 U.S.C. § 1292(b) (1970) were made, Judge Metzner granted reargument but adhered to his prior ruling denying summary judgment. (411 F.Supp. 744) His opinion with respect to the *Times* (which also denied certification) was based in its entirety on the existence of a single factual issue which

* The District Court later ruled, in denying the motion of the *Times* for judgment *n.o.v.*, that "[i]t cannot be said that the *Times* knew that the statements in the story were false." (423 F.Supp. at 519, App. C of Petition, p. 28A)

** This ruling was not thereafter challenged by plaintiffs.

was held to preclude the granting of summary judgment: conflicting deposition testimony of Arbib and Devlin as to what was said in the telephone conversation during which Arbib furnished Devlin with the scientists' names later published by the *Times*. Judge Metzner concluded that summary judgment could not be granted in the face of such conflicting testimony, because:

> "In essence, we are confronted with what may be called a 'one on one' situation. If the finder of the fact believes Arbib and disbelieves Devlin, then a jury would be justified in finding plaintiffs have sustained their burden of showing actual malice." *Id.* at 746.

The action was then tried and on June 9, 1976, following five days of trial, the jury returned a verdict against the *Times* and Audubon defendant Clement. The jury awarded compensatory damages against the *Times* and Clement with respect to the *Times* article of August 14, 1972 in the amounts of $21,000 to Dr. Edwards and $20,000 each to Dr. Jukes and Dr. White-Stevens. An additional $1.00 in compensatory damages was awarded to each plaintiff against Clement with respect to his letter of August 14, 1972 to the *Times*. No punitive damages were awarded.

The *Times* and Clement filed motions for judgment notwithstanding the verdict, both of which were denied in separate opinions issued in December 1976 by Judge Metzner. (423 F. Supp. 516, App. B and C of Petition) In his opinion as to the *Times*, Judge Metzner interpreted the jury verdict against both the *Times* and Clement as reflecting the jury's belief that the *Times* accurately reported the Clement-Audubon charges,* but cited the denials of the scientists and the scientific material furnished to Devlin by Drs. Jukes and White-Stevens in holding that the verdict against the *Times* was supported by clear and convincing

* *See* note at pp. 9-10, *infra*.

proof that Devlin's article was published with reckless disregard of the truth. (423 F. Supp. at 519, App. C of Petition, pp. 26A-29A)

The Decision of the Court of Appeals

The decision of the Court of Appeals for the Second Circuit from which a writ of certiorari is now sought reversed the judgments against the *Times* and Clement and dismissed the complaint. In an opinion by Chief Judge Irving R. Kaufman writing for a unanimous panel (comprised, as well, of former Justice Tom C. Clark of this Court and Judge William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation) the Court held that as libel law had developed since *New York Times Co.* v. *Sullivan, supra,* the verdict against the *Times* was constitutionally impermissible. In so holding, the Court initially noted that

> "Implicit in the jury's verdict against Clement is the finding, which we must accept, that the *Times* accurately reported the five scientists whose names were furnished by Arbib were the 'paid liars' referred to in the *Amercian Birds* Foreword." (556 F.2d at 120, App. A of Petition, p. 13A)

The Court also observed that "Devlin reported Audubon's charges fairly and accurately," without espousing the accusations themselves, and that he "published the maligned scientists' outraged reactions in the same article that contained the Society's attack." (556 F.2d at 120, App. A of Petition, p. 14A) In light of the protection afforded in the case law to such reports of statements by third parties, the Court concluded:

> "We believe that the *New York Times* cannot, consistently with the First Amendment, be afflicted with a libel judgment for the accurate reporting of newsworthy accusations made by a responsible and well-noted organization like the National Audubon Society." (556 F.2d at 122, App. A of Petition, p. 19A)

The Court of Appeals further held that the evidence submitted at trial was "manifestly insufficient" to meet the demanding standard of *New York Times Co.* v. *Sullivan,* even absent special First Amendment protection for neutral reportage. The Court rejected as a possible basis for a finding of actual malice against the *Times* the denials by the accused—which the Court noted are "commonplace in the world of polemical charge and countercharge"—as well as the "mass of materials" sent Devlin by the scientists which were, in any event, "largely irrelevant to the Bird Count controversy, and completely irrelevant to the assertedly libelous accusations of the Audubon Society." (556 F.2d at 121, App. A of Petition, pp. 15A-16A)

Rehearing *en banc* was sought by petitioners and denied on July 20, 1977.

ARGUMENT

The essence of the jury finding in this case was—as the District Court and the Court of Appeals both held—that the *Times* had *accurately* reported that the five scientists identified by Arbib were those referred to as paid liars in the Audubon Foreword.* Given this factual finding, peti-

* Both courts were plainly correct on this point. If the jury had believed otherwise, it could hardly have held against Clement with respect to the *Times* article of August 14 since, plainly, to the extent the *Times* printed information that Clement did *not* cause to be furnished to it, or, alternatively, printed information which was contrary in fact to that provided it as a result of Clement's efforts, there could have been no basis for finding Clement liable. New York law has long held that when a second party distorts information furnished it by another into a libel, the first party bears no responsibility for the libel. *Seroff* v. *Simon & Schuster,*

tioners have utterly failed to cast doubt on the correctness of the Court of Appeals' holding that the libel judgment against the *Times* was constitutionally impermissible—let alone to set forth a basis for review by this Court of that decision.

The holding of the Court of Appeals is entirely consistent with case law since *New York Times Co.* v. *Sullivan* affording protection to news reports describing (without commenting on the truth of) newsworthy accusations made against public figures. It is, in fact, based upon the ruling of this Court in *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971). In that case this Court held that the omission of the word "alleged" from a *Time* magazine article summarizing a federal commission's report on police brutality failed to create a jury issue of actual malice, although the omission was done knowingly and caused the article to convey an erroneous impression that the commission had adopted as fact the allegations of a complaint filed in federal court. In the Court's view, the belief of *Time* employees, even if misguided, that their article fairly stated what the commission had said, provided no basis for an inference by the jury of actual malice. The Court held that, at most, defendants had committed an error of editorial judgment in adopting "one of a number of possible rational interpreta-

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Inc., 6 Misc.2d 383, 391, 162 N.Y.S.2d 770, 777, 778 (Sup. Ct. N.Y. Co. 1957), *aff'd*, 12 App.Div.2d 475, 210 N.Y.S.2d 479 (1st Dep't 1960), *app. denied*, 12 App.Div.2d 755, 210 N.Y.S.2d 1000 (1st Dep't 1961). It has likewise been held that a person who gives a defamatory statement to a newspaper which later prints it "is responsible for any damage caused by the publication," but only "to the extent that the article represents an accurate statement" of what he said. *Campo* v. *Paar*, 18 App.Div.2d 364, 367-68, 239 N.Y.S.2d 494, 498 (1st Dep't 1963). *See also, Storch* v. *Gordon*, 23 Misc.2d 477, 479, 197 N.Y.S.2d 309, 312, 313 (Sup. Ct. Kings Co. 1960); *Roberts* v. *Breckon*, 31 App.Div. 431, 433-34, 52 N.Y.S. 638, 640 (4th Dep't 1898).

tions of a document that bristled with ambiguities." (401 U.S. at 290)

The Court in *Pape* attached special significance to the fact that the "news" element of the *Time* article there at issue, like the Devlin article of August 14, 1972, was the making of certain statements by a *third* party, which *Time* itself had not endorsed or adopted. The Court recognized that "a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*." (401 U.S. at 285 (emphasis in the original)) Noting that "[t]he question of the 'truth' of such an indirect newspaper report presents rather complicated problems", the Court indicated the need for special solicitude under the First Amendment for newspaper reports recounting what others have said without taking any independent position on the truth of those statements. (401 U.S. at 286)

Since the *Pape* ruling, the principle that the accurate reporting of charges against public figures made by reliable sources must receive special First Amendment protection has led a number of courts to afford just such protection. While the *Edwards* ruling is the latest—and most thoughtful—of these cases, it is consistent with all of them. Petitioners have cited no cases to the contrary and we are aware of none.

One prior ruling to the same effect as *Edwards* was that of the Court of Appeals for the First Circuit in *Medina* v. *Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971) affirming a lower court's summary judgment for defendants. The challenged story discussed the My Lai tragedy and carried charges made by an independent party claiming that plaintiff had killed a child. On appeal from summary judgment, plaintiff had argued that *Time* was liable for asserting the truth

of charges against the plaintiff contained in a statement made to *Time's* reporter and reprinted in *Time's* story discussing the plaintiff. Finding that *Time* had merely recounted the charges without asserting their truth, the Court held that, under *Pape*, no showing of actual malice could be sustained.

Vandenburg v. *Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975), similarly concludes that a publisher cannot, consistently with the First Amendment, be held liable for reporting accusations made against a public figure by a reliable source, even if the underlying charges reported are later determined to be false. District Court cases with similar holdings include *Thuma* v. *Hearst Corp.*, 340 F.Supp. 867 (D.Md. 1972); *Novel* v. *Garrison*, 338 F.Supp. 977 (N.D.Ill. 1971); and *Oliver* v. *Village Voice, Inc.*, 417 F.Supp. 235 (S.D.N.Y. 1976).

These cases, together with the *Edwards* decision, do no more than reaffirm what we believe should be a self-evident proposition—that the press must be free to report accusations such as those reported by the *Times* without bearing the responsibility for their underlying truth. It should be clear, for example, that if a candidate for the office of Vice President of the United States makes defamatory statements about a rival candidate, the press may freely report them, *regardless* of the views of the journalists or editors as to the truth of the charges. Of course, it is well established, as the Court of Appeals recognized, that a publisher may be held liable for reporting defamatory charges that he "in fact espouses or concurs in . . . [or] deliberately distorts." (556 F.2d at 120, App. A of Petition, p. 14A) But if, as here, the charges are reported fairly and reasonably accurately, in the words of the Court of Appeals, "[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands

that the press be afforded the freedom to report such charges without assuming responsibility for them." (556 F.2d at 120, App. A of Petition, p. 14A) The petition for certiorari, having failed to cite a single case to support a contrary result, let alone a single supportable policy reason for such a result, provides no basis for review by this Court.

The alternative holding of the Court of Appeals itself suggests the undesirability of plenary review by this Court. The determination that "[e]ven absent the special protection afforded to neutral reportage, . . . the evidence adduced at trial was manifestly insufficient to demonstrate 'actual malice' on the part of the *Times*" * is precisely the sort that this Court has frequently refrained from reviewing. *See, e.g., Bandelin* v. *Pietsch*, 98 Idaho 337, 563 P.2d 395 (1977), *cert. denied*, 46 U.S.L.W. 3202 (U.S. October 11, 1977); *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3216 (U.S. October 3, 1977); *Kapiloff* v. *Dunn*, 27 Md. App. 514, 343 A.2d 251 (Ct. Spec. App. 1975), *cert. denied*, 426 U.S. 907 (1976).

Moreover, the decision of the Court of Appeals as to this issue was plainly correct. At the heart of the allegations of reckless disregard made in the petition for certiorari is the notion that having received denials of the Audubon charges from the three scientists called by Devlin and having received information from two of the scientists setting forth their scientific positions, the *Times* should not have printed the story without more investigation and/or verification. But the law simply does not permit reckless disregard to be so divined. In both *New York Times Co.* v. *Sullivan*, *supra*, and *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the failure to engage in precisely such

* 556 F.2d at 120, App. A of Petition, p. 15A.

pre-publication investigations was held to be inadequate as a matter of constitutional law to sustain findings of liability. As this Court explained in *Sullivan,* evidence of an inadequate investigation "supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." (376 U.S. at 288)

Petitioners cite no authority to challenge the Court of Appeals' finding that the fact of the plaintiffs' denials of the Audubon charges was insufficient to support a verdict against the *Times.* Apart from what we believe to be its evident correctness, the Court of Appeals' view that denials from persons criticized are so common as to "hardly alert the conscientious reporter to the likelihood of error," much less provide a basis for liability under the clear and convincing proof standard of *Sullivan,* is entirely consistent with cases such as *Vandenburg* v. *Newsweek, Inc., supra.* Likewise, even if, as petitioners assert, the information on DDT forwarded by the scientists to Devlin discussed Audubon's bird count data (Petition, p. 22), the Court of Appeals' finding is unrefuted that this information, being "completely irrelevant" to the merits of the Audubon charges, could not, consistently with *Sullivan,* conceivably provide a basis for a judgment against the *Times.*•

• We do not deal in this brief with petitioners' suggestion that the Court of Appeals reversed the judgments herein for insufficient proof of knowing falsity, and thus allegedly "severed" the reckless disregard branch of the *Sullivan* test (Petition, pp. 3, 11), as this either misreads or misrepresents Judge Kaufman's opinion. Quite to the contrary, with respect to the *Times,* Judge Kaufman noted that the propriety of Judge Metzner's finding of recklessness against the *Times* was the sole issue before the Court of Appeals (556 F.2d at 119, App. A of Petition, p. 13A), and that the absence of any issue of alleged knowing falsity was "uncontested." (556 F.2d at 120, App. A of Petition, p. 15A)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

FLOYD ABRAMS
EUGENE R. SCHEIMAN
RUTH D. MACNAUGHTON
CAHILL GORDON & REINDEL
Counsel for Respondent
The New York Times Company
80 Pine Street
New York, New York 10005

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